

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY**

In the matter of : Case No. 05-42736/JHW
GB Holdings, Inc. : **OPINION ON MOTION TO**
 : **SEAL EXHIBITS**
Debtor :
_____ :

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The Official Unsecured Creditors Committee (the “Committee”) moves here to seal three exhibits: Exhibits “A”, “B” and “H” to the Declaration of Andrew K. Glenn filed in support of the Committee’s Objections to Debtor’s Sales Motion.¹ The Committee reflects that although it has no objection to making the exhibits public, the Committee is making the request to seal to accommodate the confidentiality concerns of the debtor-in-possession, G.B. Holdings, Inc. The United States Trustee (“UST”) opposes the request.

The first document sought to be sealed, Exhibit A, is a memo from Libra to the Independent Committee dated September 16, 2005, updating the Committee and the debtor about Libra’s progress on the sale process. The document described the level of interest evidenced by the prospective bidders contacted by Libra to purchase the debtor’s ACEH stock. As to this document, the motion to seal is moot, because the same document was publicly and electronically filed as Exhibit H to the Committee’s Declaration of Andrew K.

¹ The Committee’s motion to seal other exhibits to the Declarations of Andrew K. Glenn has otherwise been resolved.

Glenn in Support of the Committee's Objection to Debtor's Retention Applications (the "Update Memo").

The other two documents are Exhibit B, a transcript of the November 4, 2005 deposition of Gregory Bousquette, one of Libra's Managing Directors and its co-head of Investment Banking, and Exhibit H, a transcript of the November 3, 2005 deposition of Joel A. Yunis, a partner of the Katten firm. I conclude that these materials do not constitute confidential commercial information meriting protection under section 107(b).

American courts recognize "a strong presumption of public access to court records." In re Orion Pictures Corp., 21 F.3d 24, 26 (2d Cir. 1994) (citing Nixon v. Warner Commc'ns. Inc., 435 U.S. 589, 597-98, 98 S.Ct. 1306, 1312, 55 L.Ed.2d 570 (1978)). The presumption for public access is rooted in the public's First Amendment right to know about the administration of justice. Public access "helps safeguard 'the integrity, quality, and respect in our judicial system,' In re Analytical Sys., 83 B.R. 833, 835 (Bankr. N.D.Ga. 1987), and permits the public to 'keep a watchful eye on the workings of public agencies.' Nixon, 435 U.S. at 598, 98 S.Ct. at 1312." Id.

Public access to papers filed in the bankruptcy court is also codified in

the Bankruptcy Code. 11 U.S.C. § 107(a). Section 107(a) of the Bankruptcy Code provides that, “[e]xcept as provided in [Section 107(b)] . . . , a paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge.” 11 U.S.C. § 107(a).

The Orion court noted that, “[a]lthough the right of public access to court records is firmly entrenched and well supported by policy and practical considerations, the right is not absolute. In limited circumstances, courts must deny access to judicial documents - generally where open inspection may be used as a vehicle for improper purposes.” Orion, 21 F.3d at 27. In addition to the anti-identity theft provisions recently adopted in a new sub-section 107(c), the exceptions to public access to information are set out in section 107(b) as follows:

(b) On request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may--

(1) protect an entity with respect to a trade secret or confidential research, development, or commercial information; or

(2) protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title.

11 U.S.C. § 107(b).² Thus, if the relevant information “fits any of the specified categories, the court is required to protect a requesting interested party and has no discretion to deny the application.” Orion, 21 F.3d at 27.

The Committee argues that the exhibits for which it seeks protection constitute confidential commercial information.³ Commercial information has been defined as information which would cause an “unfair advantage to competitors by providing them information as to the commercial operations of the debtor.” In re Itel Corp., 17 B.R. 942, 944 (9th Cir. BAP 1982).

In In re Barney’s, Inc., 201 B.R. 703 (Bankr. S.D.N.Y 1996), the debtors-in-possession sought to keep both the identity of a proposed investor and all of the terms of that investor’s Preliminary Proposal Letter confidential. Id. at 705. The debtors claimed that this information, including the investor’s demand for \$1 million in due diligence expenses, was “commercial information” protected by section 107(b). Id. at 706. The debtors’ counsel speculated that if the terms of the letter were “publicized, other investors will submit only marginally higher and better competing offers--rather than proposals reflecting their true assessment of the debtors’ value--to the detriment of the debtors and their

² See also FED.R.BANKR.P. 9018.

³ Committee’s Motion to Seal at 6-7.

estates.” Id. at 707.

The court denied the debtors’ motion for a protective order, holding that neither the potential investor’s identity nor the terms of the Preliminary Proposal Letter were subject to the protection of section 107(b). Id. at 706–09. The court reasoned that the information could not be sealed based on the mere speculation by the debtor’s counsel that the public disclosure of the content of the letter would adversely impact the debtors’ reorganization efforts. Id. at 708. Moreover, the information could not be sealed because debtors had put their “talks with the Potential Investor in issue by seeking leave to pay that undisclosed entity up to \$1 million in estate funds against a promise only that it will complete its due diligence.” Id. at 709.

The Barney’s rationale is applicable here. The two deposition transcripts at issue relate primarily to the pre-petition connections between Libra, Katten and the debtor, i.e., the Exchange Offer and Transaction and Libra and Katten’s efforts to sell the debtor’s ACEH stock, including the due diligence efforts of prospective buyers. The Committee agreed with the debtor to move to seal the depositions in order to facilitate discovery. Apparently, the debtor’s concern, as evinced by its proposed counsel at the November 10, 2005 hearing, was to not “chill the bidding [for debtor’s ACEH stock] by indicating caps on

prices and things of that nature.” T106-10 to 11 (11/10/05). As in Barney’s, “mere speculation” that public disclosure of opinions about the value of the debtor’s ACEH stock, or of the identification of other bidders, or of negotiations with the Icahn interests or D.E. Shaw to become a “stalking horse”, might negatively impact on the proposed sale of the stock cannot invoke section 107(b) protection. Moreover, the transcripts may not be sealed because the debtor has placed in issue the subjects discussed at the depositions, including the potential value of the ACEH stock at auction, and the pre-petition connection of the Libra and Katten representatives to the debtor and related entities.

For these reasons, the Committee’s motion to seal exhibits is denied. An order reflecting this ruling shall be submitted by Committee’s counsel.

Dated: December 20, 2005


JUDITH H. WIZMUR
CHIEF U.S. BANKRUPTCY JUDGE